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11

12 UNITED STATES DISTRICT COURT
13 SOUTHERN DISTRICT OF CALIFORNIA
14

15 CHARLES GRAHAM, Derivatively)
on Behalf of Nominal Defendant LEAP)
16 WIRELESS, INTERNATIONAL, INC.,)

17 Plaintiff,)

18 v.)

19 S. DOUGLAS HUTCHESON, AMIN)
KHALIFA, GRANT BURTON, DEAN M.)
20 LUVISA, MICHAEL B. TARGOFF, JOHN D.)
HARKEY, JR., ROBERT V. LAPENTA, MARK)
21 H. RACHESKY, M.D., and JAMES D.)
DONDERO,)

22 Defendants,)

23 and)

24 LEAP WIRELESS INTERNATIONAL, INC.,)

25 Nominal Defendant.)
26 _____)
27
28

CASE NO.: 08-CV-0246-L-NLS

**REQUEST FOR JUDICIAL NOTICE
IN SUPPORT OF INDIVIDUAL
DEFENDANTS' MOTION TO
DISMISS PLAINTIFF'S VERIFIED
SHAREHOLDER DERIVATIVE
COMPLAINT**

Date: August 4, 2008

Time: 10:30 a.m.

Dept: 14

Before: The Hon. M. James Lorenz

Defendants S. Douglas Hutcheson, Amin Khalifa, Grant Burton, Dean M. Luvisa, Michael B. Targoff, John D. Harkey, Jr., Robert V. Lapenta, Mark H. Rachesky, M.D., and James D. Dondero (collectively, the “Individual Defendants”) respectfully request that this Court take judicial notice, pursuant to Federal Rule of Evidence 201, of the documents submitted as exhibits to the Declaration of Diane M. Walters in Support of the Individual Defendants’ Motion to Dismiss Plaintiff’s Verified Shareholder Derivative Complaint, filed concurrently herewith. Judicial notice of these documents is appropriate for the reasons set forth below.

A. Judicial Notice of Securities and Exchange Commission Filings Referenced in the Complaint

Judicial notice of the following documents is appropriate because they are specifically referenced in the Complaint:

1. Excerpts from a true and correct copy of Leap’s Form 10-K for the period ended December 31, 2005, filed with the SEC on March 27, 2006 (Walters Decl., Ex. A); referenced in the Complaint at ¶¶ 51-55, 77;
2. Leap’s November 9, 2007 press release, attached as Exhibit 99.1 to Leap’s Form 8-K filed with the SEC on November 13, 2007 (Walters Decl., Ex. B); referenced in the Complaint at ¶¶ 56-57.

Under the incorporation by reference doctrine, the Court may consider on a motion to dismiss documents that a plaintiff relies upon in his Complaint and whose authenticity is not questioned. *See Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994) (holding that “documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss”), *overruled in part on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *see also Parrino v. FHP, Inc.*, 146 F.3d 699, 706 n.4 (9th Cir. 1998) (documents “integral to the plaintiff’s claims” but not attached to the pleading may be considered for a motion to dismiss if their authenticity is not disputed); *In re Peerless Sys., Corp. Sec. Litig.*, 182 F. Supp. 2d 982, 987 (S.D. Cal. 2002) (“When ruling on a motion to dismiss, the court may consider the facts alleged in the complaint, documents attached to the complaint, documents relied upon but not attached to the complaint when authenticity is not contested, and matters of which the Court takes judicial notice.”).

The Court may also take judicial notice of these documents because they were filed with the Securities and Exchange Commission (“SEC”). Courts in the Ninth Circuit routinely hold that SEC filings may properly be considered on a motion to dismiss. *See In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999) (“[H]aving raised questions about [officers’] stock sales [and] based [her] allegations on [officers’] SEC filings . . . [plaintiff] can hardly complain when [the officers] refer to the same information in their defense.”) (alteration in original) (citation omitted); *In re F5 Networks, Inc. Derivative Litig.*, No. C06-794, 2007 WL 2476278, at *1 n.1 (W.D. Wash. Aug. 6, 2007) (taking judicial notice of SEC filings under Fed. R. Evid. 201); *Plevy v. Haggerty*, 38 F. Supp. 2d 816, 821 (C.D. Cal. 1998) (judicially noticing SEC filings, including 10-Ks, 10-Qs, press releases, and Form 4s; “[o]n a motion to dismiss, a court may take judicial notice of matters of public record outside of pleadings”); *see also Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991). Accordingly, the Court may take judicial notice of Leap’s filings with the SEC.

B. Leap’s Amended and Restated Certificate of Incorporation Filed with the SEC

Judicial notice of the following document is appropriate because it is a matter of public record and is “capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b):

3. Leap’s Amended and Restated Certificate of Incorporation, attached as Exhibit 3.1 to Leap’s Form 8-K filed with the SEC on August 20, 2004 (Walters Decl., Ex. C).

Courts routinely take judicial notice of a company’s public governance documents, such as articles of incorporation. *See Shurkin v. Golden State Vintners, Inc.*, No. 04-3434, 2005 WL 1926620, at *6 (N.D. Cal. Aug. 10, 2005) (finding that “district courts routinely take judicial notice of public documents such as certificates of incorporation or organization filed with the secretary of state”); *McMichael v. United States Filter Corp.*, No. 99-182, 2001 WL 418981, at *8 (C.D. Cal. Feb. 23, 2001) (“The certificate of incorporation of a Delaware corporation is a publicly filed document, and as such, can be judicially noticed.”). Accordingly, judicial notice of Leap’s Certificate of Incorporation is appropriate.

Judicial notice is also appropriate because Leap's Certificate of Incorporation was filed with the SEC. *See supra* at 1-2.

C. Slip Opinions

The Individual Defendants request that the Court consider the following slip opinion:

4. *Scimeca v. Kim*, No. 06-0562, slip op. (D. Ariz. Aug. 28, 2007) (Walters Decl. Ex. D.).

Slip opinions are matters that are not "subject to reasonable dispute in that [they are] . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

CONCLUSION

For the foregoing reasons, the Individual Defendants respectfully request that the Court grant their request for judicial notice of the above-listed exhibits in conjunction with the concurrently filed motion to dismiss the Complaint in this action.

Dated: June 2, 2008

Respectfully submitted,

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